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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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April 23, 2008

United States Senate Committee on the Judiciary
Minority Members
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Republican Senators:

I acknowledge your recent joint letter. I note that in our personal conversations several of you have worked with me and expressed a greater understanding of what we have accomplished.

First, I would urge each of you to read my statements about judicial nominations from throughout this year, most recently my remarks on April 16, and before that on April 10, April 1, March 7, March 3, and on February 7. I would also urge each of you to review my statements from our numerous confirmation hearings and business meetings. Of course, I would be happy to discuss them with you. They help establish the context in which we are proceeding, and the progress we have made and continue to make.

Frankly, your request lacks that context. It also fails to account for the conflicting and shifting demands that have been placed on me and this Committee. Earlier this year, Senator Kyl was very forceful in observing the importance of filling vacancies at the Department of Justice. Yet in subsequent choreographed Republican floor statements, the Republican leadership and all of you ignore the extensive work we have done in the wake of the resignations of nearly the entire leadership at the Justice Department. In the last several months, we have confirmed a new Attorney General, a new Deputy Attorney General, a new Associate Attorney General and held seven hearings for high-ranking Justice Department nominations. Of course, we could have made progress even sooner, had the Republican Members of the Judiciary Committee not effectively boycotted our business meetings in February and obstructed our ability to report the O'Connor nomination and had it not been the subject of a Republican hold on the Senate Executive Calendar.

A little more than a year ago, the Judiciary Committee began its oversight efforts for the 110th Congress. Over the next nine months, our efforts revealed a Department of Justice gone awry. The leadership crisis came more and more into view as Senator Specter and I led a bipartisan group of concerned Senators to consider the United States Attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manner of excess.

April 23, 2008

Page 2 of 8

This crisis of leadership has taken a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with safe harbor from political interference. It shook the confidence of the American people. Through bipartisan efforts among those from both sides of the aisle who care about Federal law enforcement and the integrity of the Department of Justice, we joined together to press for accountability. That resulted in a change in leadership at the Department, with the resignations of the Attorney General and virtually the entire leadership and leadership staff. I regret that you seem to have abandoned our bipartisan efforts in favor of election year partisanship.

It is ironic that your letter is dated the day the Senate had previously been scheduled to vote on the nomination of Catharina Haynes to fill the last remaining vacancy on the Fifth Circuit Court of Appeals. I worked closely with Senator Cornyn to expedite consideration of that nomination this year and personally chaired her confirmation hearing during a February recess period.

When you refused to cooperate in establishing a quorum at our business meetings in February, you succeeded in assuring that no judicial nominations were able to be reported until March. In addition to the executive nominees on which we have held numerous hearings, the Committee has already held hearings this year on 11 judicial nominations, the Committee has favorably reported five, and the Senate has proceeded to confirm all five. I have placed another three judicial nominees on the agenda for our meeting today and I trust that you will work with me to make additional progress in this regard.

I might note in contrast that in 1999, toward the end of President Clinton's administration, a Republican chairman did not hold a hearing on any judicial nominees until June. We are well ahead of that mark. I also recall that during a recent presidential election year with a Democrat in the White House and a Republican Senate majority, the first judicial nominee was not confirmed until July. That was the 1996 session during which not a single circuit court nominee was confirmed. We did not wait until July this year and have already beaten that session's circuit total with the confirmation of Judge Haynes earlier this month.

Of course, the five lifetime judicial appointments confirmed on April 10 were not the first judicial nominations I have helped move. Senator Specter will recall my help as chairman in connection with the nominations of Nora Barry Fischer, Thomas Hardiman to the Third Circuit, Legrome Davis, Michael Baylson, Cynthia Rufe, Christopher Conner, John Jones III, David Cercone, Timothy Savage, Terrence McVerry, Arthur Schwab, James Gardner. I also helped the Committee proceed to the Third Circuit nomination of D. Brooks Smith, a nomination which I did not support. As ranking member, I worked with Chairman Hatch and Chairman Specter in connection with the confirmations of Michael Fisher and Franklin van Antwerpen to the Third Circuit, as well as the nominations of Thomas Hardiman, Gene Pratter, Lawrence Stengel, Paul Diamond, Juan Sanchez, and Thomas Golden. With the exception of two nominees from Pennsylvania currently pending before the Judiciary Committee, every judicial nominee for a Pennsylvania vacancy nominated by President Bush has been confirmed by the Senate. That is 23 nominations in all, including four to the Third Circuit.

April 23, 2008

Page 3 of 8

Contrast this with the treatment of nominees from Pennsylvania during the last Democratic administration, when the Republican Senate majority stalled 10 nominations, one for the circuit and nine district court nominations.

Earlier this year, I thought that Senator Specter had a personal interest in the current nomination of Judge Pratter to the Third Circuit, and I was making plans to expedite consideration of that nomination in deference to him. As our process requires, that nomination needed the support of both Pennsylvania Senators. I was assured for some time that that was imminent. Unfortunately, that apparently was not the case. Nor has the President sent nominations for four district court vacancies in Pennsylvania. It is strange that the President has proceeded to nominate Carolyn Short for a vacancy that has yet to occurred, rather than one of the four that has already have. That is something the White House will need to explain.

At one point, it appeared that Senator Specter was urging me to ignore the lack of home state Senator support for the Pratter nomination, just as *The Washington Post* has recently urged consideration of nominations in Maryland and the District of Columbia that do not have such support. At various times and in your various statements and demands, and in those of the Republican leadership, I have heard a variety of suggestions and instructions for me, as well as demands for how the Committee should proceed. I have been trying to accommodate Republican Senators who have come to me individually and worked with me. That is how we prioritized consideration of the Haynes nomination at Senator Cornyn's request, the Hall nomination at Senator Chambliss's request and the Anderson nomination at Senator Alexander's request. I have also met and spoken to Senator Dole a number of times and have received a recent letter from her and others regarding the Conrad nomination. I intend to respond to that letter, as well.

As the former chairman who presided over the Republican Senate majority's pocket filibustering of more than 60 of President Clinton's judicial nominees, Senator Hatch is in position to answer a number of the unanswered questions that still haunt us. I recall a few of them in my April 16 statement to the Senate. One step toward reconciliation would be acknowledgement of this unfair behavior and acceptance of responsibility by Senate Republicans. Despite that recent history, while I have chaired the Committee, I proceeded on the nominations of Michael McConnell to the Tenth Circuit and Paul Cassell to the District Court in Utah and a number of Senator Hatch's former staffers. It is the subsequent resignation of Judge Cassell that is responsible for the only current vacancy on the Federal bench in Utah, a vacancy for which the President has not sent the Senate a nominee.

I know that Senator Grassley recalls my acting quickly at his request on the confirmation of Judge John Jarvey, Judge Michael Mellow to the Eighth Circuit, Judge James Gritzner and Judge Linda Reade. Only Steven Colloton's nomination to the Eighth Circuit was considered while I was the ranking Democratic member of this Committee. As we discussed at a recent Committee business meeting, thanks to all our work, there are no Federal judicial vacancies in Iowa.

April 23, 2008

Page 4 of 8

Senator Kyl should recall that I cooperated with him over the years to confirm a number of judges in Arizona. Most recently, we have confirmed David Campbell, Neil Vincent Wake, Frederick Martone, Cindy Jorgenson, and David Bury. Among the last judges confirmed in 2000 was his good friend James Teilborg. Senator Kyl recently asked me to schedule a hearing on the nomination of Murray Snow. In response, I have included him in the upcoming hearing on May 1. If that nomination proceeds to confirmation, it will fill the only vacancy on the Federal bench in Arizona.

Of course, at times this year Senator Kyl has demanded we turn not to the Conrad nomination, but to that of Peter Keisler for the 11th seat on the D.C. Circuit. That circuit's membership already includes several controversial appointments of this President, including that of Brett Kavanaugh. Chairman Specter chose to proceed on the Kavanaugh nomination over the Keisler nomination. That confirmation added Judge Kavanaugh to a circuit that also now includes Janice Rogers Brown and Tom Griffith. I recall that during the last three years of the Clinton administration, the Republican Senate majority refused to consider either of President Clinton's qualified nominees, Allen Snyder and Elena Kagan, and that circuit court was left with three vacancies. Currently there is only one vacancy on the D.C. Circuit.

Senator Sessions is another member I have assisted over the years. In particular, I remember the confirmation of Kristi Dubose. There were also the confirmations of Karon Boudre, Callie Granade and Mark Fuller while I chaired the Committee. The Senate has also confirmed William Steele, L. Scott Coogler, R. David Proctor, Virginia Hopkins and W. Keith Watkins, all of whom I supported. There was also the confirmation of William Pryor, which I did not support. Having obtained 10 confirmations since 2001, Alabama is another state that, thanks to our efforts, has no judicial vacancies.

Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Dennis Shedd, and my own opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell. I have been discussing the Matthews nomination with Senator Graham, not the Conrad nomination, and thought that was his priority. Apparently that may not be the case, given his signature on the April 10 letter. I intend to follow up with him individually.

I have already alluded to the most recent confirmation from Texas to the Fifth Circuit, but there have been many others, so many in fact that the Federal bench in Texas has no current vacancies. There was Jennifer Elrod to the Fifth Circuit and Reed O'Connor to the Northern District just last year.

April 23, 2008

Page 5 of 8

Before that there were confirmations of James E. Kinkeade, Alia M. Ludlum, Andrew S. Hanen, David C. Godbey, Leonard E. Davis, Ronald H. Clark, Philip R. Martinez, and Randy Crane. During my time as ranking member, the Senate confirmed Edward Prado to the Fifth Circuit, Robert Junell, Kathleen Cardone, Earl Yeakel III, Frank Montalvo, Xavier Rodriguez, Marcia Crone, Jane Boyle, Michael Schneider, Micaela Alvarez and Gray Miller. In addition, the Senate confirmed Priscilla Owen to the Fifth Circuit, although 43 Senators voted in opposition.

I was quite disappointed to see Senator Cornyn taking part in partisan attacks on the very day that we were completing the confirmation of Catharina Haynes to fill the final vacancy in Texas. With that confirmation, the Senate has proceeded over the last seven years to confirm 23 judges in Texas, including five to the Fifth Circuit.

I have also tried while serving as Judiciary Chairman to accommodate Senator Brownback. I have worked to extend a temporary judgeship that was expiring in Kansas at his request, and I introduced and helped pass through the Senate a bill to make it permanent. I presided over the consideration of the nomination of Julie Robinson that ultimately led to her confirmation. At present, given our efforts, there is only one district court vacancy in Kansas. The President has not sent the Senate a nomination to fill that vacancy.

Senator Coburn only recently joined the Committee. As he knows, there are no judicial vacancies in Oklahoma. Last year I worked with Senator Inhofe to ensure that both Gregory Kent Frizzell and Timothy DeGiusti were confirmed.

I take the trouble to mention this background because I think it relevant. When Senators, Republican or Democratic, have come to me in good faith, I have done my best to work with them all. Your joint letter fails to recognize any of those efforts.

As you will see from my April 16 statement to the Senate, I intend to proceed next to the nomination of Steven Agee to the Fourth Circuit. I have already noticed his hearing for May 1, and I thank Senator Cardin for his willingness to chair that hearing. At that time, we will also consider the nomination of Murray Snow of Arizona, at Senator Kyl's request, and that of William Lawrence of Indiana, at Senator Lugar's request. The nomination of Steven Agee is to one of Virginia's long vacant Fourth Circuit seats. It is my hope that this will help us to make progress in filling vacancies and reducing those on the Fourth Circuit. The Agee nomination is a breakthrough that affords us the opportunity to be productive. It follows years of contentiousness, as President Bush insisted on nominations like those of Jim Haynes, Claude Allen and most recently Duncan Getchell. You will recall that Mr. Getchell did not have the necessary support of either Senator Warner or Senator Webb. I have been working with the Virginia Senators. Their successful efforts working with the White House are to be commended. I intend to encourage this President to finish out his term by finally acting in cooperation with the Senate by prioritizing action on this nomination.

April 23, 2008

Page 6 of 8

I also have announced that I intend promptly to proceed to consideration of the nominations of Ray Kethledge and Judge Helene White to the Sixth Circuit. I have long urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last week our extensive efforts culminated in a significant development that can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit.

With the cooperation of the Committee I believe we should be able to consider and favorably report all three of these circuit court nominees. That is consistent with the approach I have taken throughout my chairmanship. I believe that the results have been positive. We were able to achieve 100 confirmations during the 17 months I chaired the Committee during the 107th Congress. Last year, we sent 40 judicial nominations to the Senate and all 40 were confirmed. That was more than had been confirmed in any of the three preceding years when a Republican chairman and Republican Senate majority managed the process.

If we were, instead, to turn the Committee's attention to other, more controversial nominations, we run the risk of becoming embroiled in debate for months, and will be foregoing the opportunity to make progress where I believe we can. We will also, in effect, be rejecting the White House's recent efforts to work with us. I prefer to make progress where we can in this presidential election year, and to work together to do so. I hope you will join me in these efforts.

I am sure there are some who prefer partisan fights designed to energize a political base, but I do not. I hope you will agree with me. When the Republican majority stalled consideration of President Clinton's judicial nominees, they more than doubled the circuit court vacancies from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that. Today, circuit court vacancies have been reduced to only 12 across the nation, instead of 32, less than at any time since the 1996 session. With the confirmations of the Virginia and Michigan nominees I have identified, we could lower circuit vacancies to single digits for the first time in decades.

In fact, our work has led to a reduction in vacancies in nearly every circuit. We have lowered vacancies in the Second Circuit, the Fifth Circuit, the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job and do not break down into partisanship.

April 23, 2008

Page 7 of 8

Indeed, the only circuit that has more vacancies than it did at the end of the Clinton administration is the First Circuit, which has gone from no vacancies to a single one. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today that they had at the end of the Clinton administration. When we take action on the Agee nomination from the Fourth Circuit, even that circuit will be in an improved posture.

I am well aware of the recent history of judicial nominations to the Fourth Circuit. The reason there are so many vacancies on the Fourth Circuit from North Carolina and that they are labeled as judicial emergencies is because the Republican majority refused to consider any of President Clinton's nominees.

All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. They included United States District Court Judge James Beaty, United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. In contrast, I presided over the confirmations of two of President Bush's nominees to the Fourth Circuit in the 107th Congress and as ranking member, worked to help confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her during the 108th Congress.

During the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. After the confirmation of Steven Agee of Virginia, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.

I urge you to reconsider the course you appear to be taking. The last contentious judicial nomination was that of Leslie Southwick. The process of Senate consideration from the time of the hearing to his confirmation was five and one-half months. I urge you to consider what was not achieved in the last several months of the last Congress. The Republican chairman chose a different course, as was his right. He had the Committee hold many hearings on many controversial nominations. That resulted in a great deal of effort and conflict but not in as many confirmations as might have been achieved. You can pick fights over a few of the more controversial nominations or we can continue to make significant progress.

Democrats have not acted as Republicans did during the Clinton administration when Republicans pocket filibustered more than 60 judicial nominations and voted lock step against the confirmation of Ronnie White. I still await Republican acknowledgement of responsibility and acceptance of accountability for those actions during those years. The Democratic Senate majority has not engaged in a tit-for-tat. Rather, by cutting the vacancies as we have, we have taken a giant step toward resolving problems. We are now, finally, on course to resolve the longstanding impasse in the Fourth Circuit and in the Sixth Circuit. I continue my efforts to achieve what we can by working together this year. I will consult with you, as I will with the Senate Democratic leadership and all members of the Judiciary Committee.

April 23, 2008

Page 8 of 8

During the remainder of this year, if you will work with me rather than pick fights, I am confident we can not only make progress but we will be in position to complete the restoration of the confirmation process during the next President's administration and finally overcome years of partisan rancor.

Sincerely,



PATRICK LEAHY
Chairman

The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Charles E. Grassley
The Honorable Jon Kyl
The Honorable Jeff Sessions
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Sam Brownback
The Honorable Tom Coburn